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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 325

EDWARD E. STEVENS,

Petitioner,

vs.

CLARA M. EDWARDS ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

GEORGE PALMER GARRETT,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Edward E. Stevens hereby presents his petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit affirming a judgment of award entered by the United States District Court of the Southern District of Florida, and thereupon shows unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

An award was made in a condemnation proceedings instituted by the United States Government, in the United States District Court for the Southern District of Florida, under U. S. C. A., Title 40, Section 258a, for the acquisition of part of Government Lot 4 of Section 35, Township 25 South, Range 37 East of Tallahassee Meridian, in Brevard County, Florida, for use as a part of a subsidiary naval air base. The contest here presented is between Edward E. Stevens and Clara M. Edwards, each of whom claims adversely against the other, to be entitled to the sum of money, $1,421.20 out of the total sum of $1,942.50, estimated by the Government to be just compensation for the land taken, and deposited by the Government in the registry of the Court to the use of the persons entitled thereto. The District Judge awarded the said sum of $1,942.50 as follows: to Edward E. Stevens, as alleged mortgagee, $271.30; to the County of Brevard, $250.00 as compensation for right of way; and to Clara M. Edwards, as alleged fee owner, $1,421.20. Edward E. Stevens appealed. The Circuit Court of Appeals of the Fifth Circuit affirmed the District Court. Stevens now petitions for writ of certiorari.

Petitioner contends that the award of $1,421.20 to Clara M. Edwards, made by the District Judge of the United States District Court, in and for the Southern District of Florida, under U. S. C. A., Title 40, Section 258a, constituted a decision of an important question of local law in a way in conflict with applicable local decisions.

The facts disclosed by the pleadings and the evidence are that:

On February 12, 1937, the title to Government Lots 1 and 2 of said section was in Ocean Beach Improvement Com-

pany, and the title to Government Lots 3 and 4 of said section was in the name of Peninsula Land Company (R. 49). The majority of the stock of both of these companies was owned by Clara M. Edwards (R. 50), whose husband, Gus C. Edwards, was president and manager of each of them. On February 12, 1937, one Reed was in the process of foreclosing in two tax foreclosure suits, certain tax certificates which he held against all four of said Government lots (R. 49). One of Reed's tax foreclosure suits was against Lots 1 and 2 and the other was against Lots 3 and 4. On said date final decrees for complainant had been entered in said two foreclosure suits, and the date of the foreclosure sales was imminent (R. 49). Gus C. Edwards was frantically seeking the sum of $3,404.97 to save the properties from being sold at said foreclosure sales (R. 50). In the course of his effort to raise this money, Edwards had, shortly prior to February 12, 1937, endeavored to procure a loan from Stevens with which to pay up these taxes. Stevens had declined to make any loan to Edwards or his companies, because Edwards had owed him for a number of years a six thousand dollar mortgage on which the interest had not been paid. Subsequent to such refusal, but prior to February 12, 1937, one Charles S. Stuart, a business associate of Edwards, saw Stevens and tried to induce him to make a loan to Edwards to pay said taxes. Stevens again positively refused to make any loan to Edwards. Stuart then asked Stevens if he would pay off Reed and take title to Government Lots 1, 2, 3 and 4 and give Edwards an option to buy the property back. This Stevens finally agreed to do, for a profit of $500.00. The following day, this proposal was discussed between Edwards and Stevens in Stuart's presence. The method proposed was that the Ocean Beach Improvement Company would make Stevens an absolute warranty deed to Government Lots 1 and 2, and the Peninsula Land Company would make Stevens a deed to

Government Lots 3 and 4, and that Stevens would give Mrs. Clara M. Edwards an option to purchase all of said lots for the amount advanced by Stevens plus $500.00. Stevens then expressed doubt as to whether he would acquire absolute title to the said properties by such a transaction. Thereupon, Edwards asked Stevens whether, if he, Edwards, should get one A. J. Lussier (an attorney in Orlando, and who was a former associate of Edwards, and whom Stevens had at times consulted professionally) to tell him, Stevens, that Stevens would acquire good title to said properties by the proposed transaction, Stevens would go forward with the transaction as proposed. Stevens agreed to this. Edwards got Lussier to meet him and Stevens in Titusville for a conference. In the conference which followed his arrival, Lussier advised Stevens that the warranty deeds tendered him by Edwards and made by the two companies to Stevens covering their respective properties in fact transferred the title to said properties to him (R. 101, 102, 103, 140, 142, 143). On the faith of this advice, Stevens paid to the Clerk Circuit Court the sum of $1,425.32 (R. 174) as the amount necessary to settle the taxes against Government Lots 1 and 2, and the sum of $1,565.31 (R. 170), as the amount necessary to settle the taxes against Government Lots 3 and 4, a total of $3,404.97, the tax foreclosure suits were dismissed, the tendered deeds from the two Edwards' companies were delivered to Stevens (R. 186 and 183), and Stevens gave Mrs. Clara M. Edwards an option (R. 188) to purchase all of these properties for $3,900.00 at any time prior to November 1, 1937 (R. 50).

The lands in controversy are wild lands and since February 12, 1937, Edward E. Stevens has been in constructive possession thereof.

On April 23, 1937 (R. 50 and 204), a memorandum agreement was entered into between Edwards as attorney for his wife, Clara M. Edwards, and Edward E. Stevens,

whereby it was agreed in reference to a sale of 330 feet of ocean frontage off Lot 4 for the net price of $1,782.00, that Stevens should receive $1,000.00 of the proceeds of such sale, $500.00 of which should be credited on the interest due on the old $6,000 mortgage held by Stevens against Edwards on other properties, as aforesaid, and $500.00 of which should be credited on the option, and that "thereafter, all sales made of the acreage in 330 ft. tracts, said Stevens will be paid $1,000.00 from proceeds of each sale, crediting funds at ratio of 40% on mortgage and 60% on option, but said Edwards agrees to keep paying to Stevens $1,000.00 from the proceeds of each sale until all interest to date has been paid on said mortgage and an unsecured note amounting to about $400.00 has been paid" (R. 205). Three such sales, including the one just recited, were made, two before the option expired and one subsequent to November 1st., 1937, the date of its expiration. These sales were expressly permitted by Stevens for reasons explained by him in his testimony. On such sales, there were credited (1) On April 10, 1937, $500.00 on the old mortgage indebtedness of Edwards and $500.00 on the option, (2) On April 16, 1937, $500.00 on the interest on the old mortgage indebtedness of Edwards and $500.00 on the option, (3) On June 4, 1938, $233.06 on the interest, $223.09 on taxes, and $330.78 on the option (R. 189). Since the option (R. 188) was for $3,900.00, and the aforesaid credits on option total $1,330.78, there remained $2,565.22 due on the principal amount of the option at the time the award was made.

Such was the state of affairs at the date, October 30th, 1939, that this condemnation proceeding was instituted (R. 1). *Subsequently, on January 4, 1940* (R. 38), the Peninsula Land Company made a warranty deed of Government Lots 3 and 4 to Clara M. Edwards, who, thereafter, on January 8, 1940 (R. 37) filed her application for payment to her of the entire award less the sum of $312.25,

which she said was all that remained due to Edward E. Stevens on the indebtedness on Lot 4. On January 18, 1940, Stevens filed his reply to this application (R. 43), and, on the same day (R. 47), filed his application for payment to him of the entire award. The District Judge took testimony on the merits of the conflicting claims and, on February 1st, 1940 (R. 49), entered an order distributing the fund on deposit (R. 49). In determining the method of distribution the District Judge found (R. 51) that the above recited transaction amounted to the making by Peninsula Land Company of a mortgage (evidenced by a deed) (R. 183) to Edward E. Stevens for $1,565.31 (R. 170) on Government Lots 3 and 4, and the making by Ocean Beach Improvement Company of a mortgage (evidenced by a deed) (R. 186) to Edward E. Stevens for $1,425.32 (R. 174) on Government Lots 1 and 2. He further found that, since all the sales of acreage had been of parts of Government Lot 3, all the credits for monies received by Stevens from such sales and by agreement of the parties, to be credited on the option held by Clara M. Edwards, should be credited on the so-called mortgage given Stevens by the Peninsula Land Company, consisting of the warranty deed to Government Lots 3 and 4. After allowing these credits, he found (R. 51) that all the advances which Stevens had made for the Peninsula Land Company, including taxes paid by him upon the land of said Company with 6% added thereto, had been paid back to Stevens on this so-called Peninsula Land Company mortgage, except $271.30. Thereupon, the District Judge distributed the award as hereinbefore recited.

Stevens appealed from this decision to the Circuit Court of Appeals of the Fifth Circuit, which, on June 13, 1940, affirmed the judgment of the District Judge with an opinion which dealt with the case as one solely of evidentiary dispute and failed to pass upon the correctness of the applica-

tion by the District Judge of the legal principles governing the rights of the respective adverse claimants. As a matter of fact, there is no serious dispute between the claimants as to the facts involved in this controversy. The dispute is as to the proper application of applicable legal principles. The District Judge misconstrued a Florida case (*Markell* v. *Hilpert,* — Fla. —, 192 So. 392), and on the basis of such misconstruction over-rode the applicable Florida doctrine announced in *Holmberg* v. *Hardee,* 90 Fla. 787, 108 So. 211, thus deciding an important question of local law in a way in conflict with the applicable local decision.

B.

Statement Particularly Disclosing the Basis Upon Which it is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

In view of the fact that the record is clear that Stevens understood and intended that he was getting absolute title to Lots 3 and 4, by the deed and option transaction above recited, it is the contention of petitioner that, in affirming the judgment of the District Court, the Circuit Court of Appeals for the Fifth Circuit has affirmed an erroneous decision by the District Judge of an important question of local Florida law in a way in conflict with the applicable local decision, namely:

Citation:

Holmberg v. *Hardee, Governor,* 90 Fla. 787, 108 So. 211,

which case holds that to convert a deed absolute in terms into a mortgage, the understanding and intention of both parties to that effect should be concurrent and the same.

C.

The Questions Presented.

The questions presented on this petition for writ of certiorari are as follows:

Question No. 1.

Where it is the law of Florida (*Holmberg* v. *Hardee*), 90 Fla. 787, 108 So. 211) that a deed which is absolute in form is to be taken either as an absolute deed or as a mortgage, depending upon the intention of both the parties thereto with regard thereto at the time of its execution, and the instrument itself in connection with the contemporary and subsequent writings and oral agreements of the parties concerning the subject matter discloses that it was the intention of the parties (or, at least, of Stevens, the grantee) at the time of the execution of said deed that it should vest absolute title, is a decision of the District Court, in distributing an award in a condemnation suit, that disregards the intention of the grantee, a decision of an important question of local law in a way in conflict with applicable local decisions?

We contend "Yes".

Question No. 2.

Under the circumstances set forth in the foregoing Summary Statement of the Matter Involved, namely, that the warranty deed to Stevens is made by the Peninsula Land Company, and the option to purchase is made by Stevens to Clara M. Edwards, and that Gus C. Edwards, who controls the Peninsula Land Company, and is the husband of Clara M. Edwards, who is the principal stockholder in the Company, is a lawyer and in dealing with Stevens, a layman, represents and causes to be represented to Stevens that he will get absolute title by accepting a warranty deed and giving an option, does the case of *Markell* v. *Hilpert*, — Fla. —, 192 So. 392, control.

The District Judge, and the Circuit Court of Appeals ruled "Yes".

We contend "No".

Question No. 3.

Under the circumstances set forth in the Statement of the Matter Involved was the deed made by Peninsula Land Company to Clara M. Edwards *after* the condemnation suit was instituted, and while Edward E. Stevens was in constructive possession of the *locus in quo*, champertous, and, therefore, void as against Stevens who is a claimant adverse to Clara M. Edwards.

The District Judge held "No".

We contend "Yes".

The Reasons Relied Upon for the Allowance of the Writ.

Petitioner believes himself entitled to the allowance of writ of certiorari for the following reasons:

Reason No. 1: This case was decided by the District Judge upon a misconstruction of the recent Florida case of *Markell* v. *Hilpert*, — Fla. —, 192 So. 392.

The cited *Markell* case was one wherein the facts were that one Markell loaned certain monies to one Hilpert and, to secure the loan, took a warranty deed from Hilpert and gave Hilpert an option to repurchase the property. Subsequently Hilpert tendered repayment of the loan, and same was refused. On bill to redeem the deed was held to be a mortgage.

In our case the deed was from the Peninsula and Company to Stevens, and the option was given by Stevens to Clara M. Edwards, who never had held title. Moreover in our case there is the element of estoppel arising out of the representations made by Edwards, a lawyer, to Stevens, a layman, that Stevens was acquiring indefeasible fee title

to the lands and not merely a mortgage lien thereon. Stevens made his advances only on the faith of that representation and with the intention of acquiring absolute title.

Hence, the *Markell* case *supra,* does not apply.

The applicable Florida rule is that stated in *Holmberg* v. *Hardee,* 90 Fla. 787, 108 So. 211, that to convert a deed, absolute in its terms, into a mortgage, it is necessary that the understanding and intention of *both* parties to that effect should exist at the time of the execution and delivery of the deed.

Hence the District Court decided said important question of local law in a way in conflict with the applicable local decisions. The Circuit Court of Appeals for the Fifth Circuit affirmed the District Judge on the authority of the *Markell* case *supra,* thus affirming this misconstruction of the cited *Markell* case by the District Court.

For this reason certiorari lies under sub-division (b) of Rule 38 of the Supreme Court.

Reason No. 2: The District Judge gave no consideration to the many Florida cases such as *Watkins* v. *Emmerson,* 88 Fla. 86, 102 So. 10, holding that a deed by a party out of possession of a tract of land to another party out of possession thereof is void as against an adverse claimant.

In our case, the record shows that the tract of land was in the possession of Stevens when, after the condemnation suit was instituted, the Peninsula Land Company, a party out of possession of said tract, made a deed of said tract to Clara M. Edwards, also a party out of possession of said tract. Hence, said deed from the Peninsula Land Company to Clara M. Edwards was champertous and void as against Edward E. Stevens who claims adversely to both of them.

Hence, the decision of the District Judge disregarding the effect of these Florida cases on champerty decided a

question of local law in conflict with the applicable local decisions. The Circuit Court of Appeals of the Fifth Circuit reaffirmed the erroneous decision of the District Judge.

For this reason, certiorari lies under sub-division (b) of Rule 38 of the Supreme Court.

Reason No. 3: The aforesaid decision of the District Judge in disregarding the element of estoppel consisting of representation by Gus C. Edwards, a lawyer, to Edward E. Stevens, a layman, upon which Stevens relied, that Stevens would acquire absolute title to the real property as the result of the transaction with the Peninsula Land Company and Clara M. Edwards as aforesaid, departed from the principles of equity, which should govern this type of proceedings (*Welch* v. *Tennessee Valley Authority*, C. C. A. Tenn. 1939, 108 F. (2d) 95), to such an extent as to amount to a taking of the property of Stevens without due process of law. Moreover, the procedure applicable when private property is taken for public use is exclusively a product of the legislative and judicial systems of the United States (*Welch* v. *Tenn. Valley, supra*). Hence said decision is of a Federal question, and said question was decided in a way probably in conflict with the applicable decisions of the Supreme Court.

Hence, the decision of the District Judge, concurred in by the Circuit Court of Appeals, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its powers of supervision.

For this reason certiorari lies under sub-division (b) of Rule 38 of the Supreme Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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No. 325

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals rendered in the above case will be found as follows:

> Edward E. Stevens, Appellant *v.* Clara M. Edwards, et al., Appellees, C. C. A. 5th Circuit, 112 Fed. Rep., 2d Series, Page 534, Advance Sheet No. 3.

There was no opinion by the District Court and his findings are incorporated in the order appealed from which was entered on the first of February, 1940, and will be found at R. 49 to 54, inclusive.

II.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347.

2. The date of the judgment to be reviewed is June 13, 1940. Petition for rehearing was denied July 24, 1940.

3. The nature of the case, and the fact that the rulings were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari, under Subdivisions A and B respectively. Hence, in the interest of brevity these statements are not here repeated.

III.

Statement of the Case.

Inasmuch as the statement of the case is set forth in Subdivision A of the petition for writ of certiorari, for the sake of brevity, repetition of same will be omitted here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In affirming the District Court in its distribution to Clara M. Edwards of the sum of $1,421.20 out of the total award of $1,942.50.

2. In view of the circumstances set forth in Subdivision A of the attached petition for writ of certiorari, in ignoring the local Florida law as stated in the case of

Citation:

Holmberg et al. v. *Hardee, Governor,* 90 Fla. 787, 108 So. 211

that in order to convert a deed absolute in its terms into a mortgage, it is necessary that the understanding or intention of *both* parties to that effect should be concurrent and the same.

3. In ruling that the case of
Citation:
Markell v. *Hilpert*, — Fla. —, 192 So. 392

where the deed was made by the same person to whom the option was given and where there were no circumstances of equitable estoppel and misrepresentations such as exist in our case controlled the award in the present case.

V.

ARGUMENT.

Summary of the Argument.

Petitioner claims that he owned the land condemned, and, therefore, was entitled to the award. He acquired the land on the understanding that he was acquiring absolute title thereto. He did not give his option to purchase to the corporation which made him the deed, namely: the Peninsula Land Company, but to a third person, namely: Clara M. Edwards. This was a method devised by Gus C. Edwards to satisfy Stevens' demand for absolute title. Mrs. Edwards is estopped by her husband's action to claim now that the method only resulted in giving Stevens a mortgage which he had definitely refused to accept. We now cite authorities to the Questions #1, 2, 3 set forth in the foregoing petition for certiorari.

Authorities on Questions No. 1 & 2.

It is the law of Florida that to convert a deed, absolute in its terms, into a mortgage, it is necessary that the under-

standing and intention of *both* parties to that effect be concurrent and the same.

Holmberg v. *Hardee*, 90 Fla. 787, 108 So. 211;
McKinney v. *Gainey*, — Fla. —, 118 So. 917.

Mere secret intention of either party as to the purpose of the instrument will not control.

Stovall v. *Stokes*, 94 Fla. 717, 115 So. 828.

Note Below: Hence, if Edwards, despite his representations to Stevens, secretly intended the deed as a mortgage, his private intent cannot overrule the language of the deed.

The burden of proving an absolute deed to be a mortgage is upon the grantor.

Brumick v. *Morris*, 131 Fla. 46, 178 So. 564.

A deed absolute in its terms will not be construed as a mortgage where, after its execution there remains no indebtedness from the grantor to the grantee.

Brumick v. *Morris, supra.*

Note Below: After the Peninsula Land Company executed its deed to Edward E. Stevens on February 12, 1937, there remained no indebtedness from the Peninsula Land Company to Edward E. Stevens. Mrs. Edwards merely had the privilege, until November 1, 1937, to purchase (not repurchase) the land.

The Florida cases holding an absolute deed to be a mortgage where there was an option to reconvey are all where the option was to *re*convey to the grantor and not, as in our case, where the option is given to a third person who never had owned the title.

Franklin v. *Ayer*, 22 Fla. 654;
Brown v. *Banning*, 71 Fla. 208, 71 So. 327;
Brumick v. *Morris, supra;*
Markell v. *Hilpert, supra.*

Such was the fact in the case of

Markell v. *Hilpert*, — Fla. —, 192 So. 392,

which was the authority upon which the District Judge bottomed his decision in our case. Hence, the decision in our case is contrary to the applicable local law which is controlled by the above-cited propositions from the cases of *Holmberg* v. *Hardee, supra,* and *Brumick* v. *Morris, supra.*

Authorities on Question No. 3.

The lands involved in this case are wild and vacant lands. When the Peninsula Land Company conveyed same to Edward E. Stevens, the constructive possession of said lands passed to Stevens. On January 4, 1940, when Peninsula Land Company made its deed of said lands to Clara M. Edwards, Edward E. Stevens was in constructive possession of said lands. Hence, the deed from Peninsula Land Company to Clara M. Edwards was from a party out of possession to a party out of possession of land in the adverse possession of Stevens. Such a deed was champertous and void as to Stevens.

Citation:

A deed by one to land which is in the adverse possession of another is void as against such adverse claimant. *Watkins* v. *Emmerson,* 88 Fla. 86, 102 So. 10.

Conclusion.

By the judgment of the District Judge appealed from, the sum of $1,421.20 of the total award of $1,942.00 was taken from Edward E. Stevens who was the record owner of the property condemned and given to Clara M. Edwards, who had never held any right, title or interest therein. In accomplishing this inequitable result the District Judge violated those rules and principles applied by the Supreme Court of Florida in like cases hereinbefore cited as authori-

ties to Questions No. 1 and 2. It was the duty of the District Judge to follow the State decisions. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188. The violation by the District Court of the said State court rules and principles was due to a misconstruction on the part of the District Judge of the meaning and effect of the case of *Markell* v. *Hilpert,* — Fla. —, 192 So. 292. The rules and principles misapplied were those established by the Florida court as to the circumstances when an absolute deed is to be deemed a mortgage. This decision of an important question of local law contrary to the applicable local decisions amounts to want of "due process of law". This is so because due process of law, when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *Endicott-Johnson* v. *Encyclopedia Press,* 266 U. S. 285, 69 L. Ed. 288.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

REPLY FOR RESPONDENTS.

The Order of the District Court, R. 49 to 54, and the opinion of the Circuit Court of Appeals, R. 261 to 262, tell the whole story. Both lower courts have concurred on the facts, and the decision is controlled by the facts.

The Florida cases cited in the opinion of the Circuit Court of Appeals are in full harmony with the conclusions reached by the Circuit Court of Appeals.

The Application for Writ of Certiorari is purely for delay, and the motives of Petitioner Stevens in that behalf are set forth in our Objections to the Stay of Mandate, R. 269 to 271.

The frivolous character of the Petition for Writ of Certiorari is further shown by Petitioner's Question No. 3, pages 9 and 11 of the Petition, because the title to the land has been in the Government ever since the declaration of taking, filed October 30, 1939, R. 23 to 29. See 40 U. S. C. A., Sec. 258-a.

Respectfully submitted,

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(9426)